IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

Petitioner,

v.

JUAN CARLOS MORENO ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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September 16, 1977

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit (Pet. App. 54a), affirming the District Court's decision, is reported at 556 F.2d 573 (1977).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the courts below correctly held that the University of Maryland's policy which adopts state domicile as the basis for awarding the lower, in-state rates for tuition and fees, but refuses to allow aliens holding non-immigrant "G-4" visas to show Maryland domicile for that purpose, violates the Due Process Clause.

2. Whether the decision below can in any event be supported on (a) the alternative ground that the University's policy toward G-4 aliens violates the Equal Protection Clause, or (b) the further alternative ground that the policy intrudes in areas reserved for federal regulation, in violation of the Supremacy Clause.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions set forth in the Petition, this case involves Article VI, Cl. 2 (Supremacy Clause) of the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[1]These issues involving the Equal Protection and Supremacy Clauses were raised in the respondents' complaint in the District Court and were briefed and argued there. However, since the trial judge ruled in the respondents' favor on the due process question, those issues were not decided either in that court or by the Fourth Circuit, which summarily affirmed the trial court's decision. Those points, however, may properly be raised by the respondents in opposing the Petition for Certiorari. *Dandridge v. Williams*, 397 U.S. 471, 475 (1970); *Langes v. Green*, 282 U.S. 531, 535-539 (1931); and see Stern & Gressman, *Supreme Court Practice* 314-315 (4th ed. 1969).

STATEMENT OF THE CASE

The respondents are three students attending the University of Maryland. They reside in Maryland with their parents, upon whom they are financially dependent. Their fathers are employees of international organizations— two employed by the Inter-American Development Bank ("IDB") and the third employed by the International Bank for Reconstruction and Development ("World Bank") — and as such hold non-immigrant alien visas issued pursuant to 8 U.S.C. §1101(a)(15)(G)(iv), known as "G-4 visas."[2]

The respondents entered the University as freshmen in the fall of 1974. Their applications for "in-state" tuition rates were denied on the basis of a policy adopted by the University in September 1973. Under that policy, as the petitioner states, "the University . . . bases its award of in-state status on domicile" (Pet. 4). Its policy document contains a general definition of domicile[3] and lists eight non-exclusive criteria for determining domicile (Pet. App. 3a-4a). The University denies in-state rates to students who are, or are financially dependent upon, non-immigrant aliens — including holders of G-4 visas — because it presumes that such non-immigrant aliens "cannot have the requisite legal intent to establish Maryland domicile" (Pet. 5).[4]

[2]G-4 visas are those issued to "[o]fficers or employees of . . . international organizations [covered under the International Organizations Immunities Act, 22 U.S.C. 288], and the members of their immediate families."

[3]That definition is as follows:

> "A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time." Pet. App. 3a.

[4]Prior to September 1973, the University had also based the grant of in-state tuition rates on Maryland domicile, but had drawn no distinction between American citizens or permanent immigrants and aliens holding G-4 visas, so long as the parents of the student applicant had owned or occupied property in Maryland for six months prior to the grant of in-state status.

We note, in particular, that one of the University's listed criteria for determining domicile is the payment of "Maryland income tax on all earned income" (Pet. App. 4a), and the international agreements establishing the IDB and the World Bank preclude both the Federal Government and the States from collecting income taxes on the salaries received by non-American employees of those organizations.[5]

After unsuccessfully exhausting their administrative appeals within the University, the respondents filed a class action in the District Court on May 27, 1975, alleging that the University's denial of in-state status to G-4 visaholders and their children violated the Due Process, Equal Protection, and Supremacy Clauses of the Constitution.[6] On July 13, 1976, the District Court ruled in the respondents' favor, holding that G-4 visaholders are not legally incapable of establishing Maryland domicile and that for the University, which bases its in-state rates on domicile, to presume conclusively that they are so incapable, without providing them the opportunity for a hearing on the question, is in these circumstances a denial of due process under *Vlandis v. Kline*, 412 U.S. 441 (1973), and similar cases.[7] The Fourth Circuit affirmed that ruling on April 28, 1977.

The particular facts with respect to each of the respondents are set forth in the District Court's opinion (Pet. App. 12a-15a).

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[5]See Agreement establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4379; and Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 1502. The employees of these banks cannot waive this tax exemption. 40 Op. Atty. Gen. 131, 172-73 (1953).

[6]The District Court ultimately certified the suit as a proper class action (Pet. App. 50a).

[7]Although the District Court stayed the effect of the judgment, it required the petitioner and the University to agree to a refund for the class represented by the respondents if the respondents prevailed on appeal. The same condition applies pending decision in this Court.

Generally, they show that the respondents are children of long-time employees of the two international organizations, and that the parents of the respondents have resided in Maryland and owned real estate in that State for periods of time varying from over 7 to over 15 years. The facts also establish that the respondents' parents have paid all Maryland taxes except taxes on their salaries as employees of the IDB or the World Bank. The taxes paid include local real estate taxes, the state sales tax, motor vehicle, fuel, excise and other taxes, and in some cases federal and state income taxes on income other than salaries from the two international banks. Two of the respondents attended elementary and secondary schools in the United States without interruption. The mother of one of the respondents is a citizen of the United States and is registered to vote in Maryland. All of the respondents' parents have their automobiles registered in Maryland. The respondents' fathers hold their positions with the banks on a long-term, indefinite basis; their employment is not for a fixed term or period of time. During the course of the appeal proceedings before University officials, the respondents and their parents stated that they have no present intention to reside anywhere other than in Maryland.

We should also point out that the University has admitted that, under its policy on determining in-state tuition status, an *immigrant* alien could show Maryland domicile even if he was exempt from Maryland income tax (Pet. App. 42a). However, in order for a G-4 alien or any non-immigrant alien who plans to work in the United States (other than one closely related to an American citizen or immigrant alien, such as parent or spouse) to change his visa status to that of immigrant, he must obtain the certification of the Secretary of Labor that there are not sufficient workers in the United States who are able, willing, qualified, and available to perform that work, and that this employment will not adversely affect the working conditions of American workers. 8 U.S.C. §1182(a)(14). With certain exceptions inapplicable here, obtaining such a certification requires the alien's employer

to file a form relating to the alien's qualifications and a form containing a job offer to the alien. 29 C.F.R. 60.3(e)(1) and (2) (1976). The IDB and the World Bank do not file such forms for several reasons. First, Congress has established a special visa category for the employees of international organizations and their families. Next, the banks are unable to make a job offer under the statute since they are "international organizations," not United States employers, and thus cannot certify, as required by the prescribed job offer form, that they have looked for and cannot find United States citizens who are equally qualified. Finally, the agreements establishing the two banks require that "due regard" be paid "to the importance of recruiting the staff on as wide a geographical basis as possible";[8] and the banks interpret this provision, and the establishment by Congress of a separate visa category for aliens working for international organizations, as precluding them, except in very exceptional situations (such as in the case of an employee about to retire), from assisting staff members in efforts to become immigrants in the United States while such persons are employed by the banks. The respondents have no control over these policies of the IDB and the World Bank.

REASONS FOR DENYING THE WRIT

The respondents submit that a writ of certiorari should not issue in this case because the decision below was correct and is not in conflict with any decisions of this Court or with those of any other circuit. As we will demonstrate, this Court's decision in *Vlandis v. Kline, supra*, was left unimpaired by *Weinberger v. Salfi*, 422 U.S. 749 (1975), and other subsequent decisions of this Court; and *Vlandis* controls the result here. In any event, as

[8]Art. VIII, §5(e), 10 U.S.T. 3029, T.I.A.S. No. 4397; Art. V, §5(d), 60 Stat. 1440, T.I.A.S. No. 1502.

we will also show, the decision below can be supported on the alternative grounds that the University's policy in question (1) denies equal protection of the laws to a group of aliens under the principles most recently applied in *Nyquist v. Mauclet*, ____ U.S. ____ , 45 U.S.L.W. 4655 (1977), and (2) interferes unlawfully with international agreements to which the United States is a party and with the Federal Government's plenary power over immigration and naturalization. Finally, we will show that no compelling considerations of public policy exist to support the grant of the writ in this case.

I.

The Courts Below Correctly Held That the University's Policy at Issue Violates the Due Process Clause, and That Ruling Raises No Conflict with Other Decisions.

In the courts below, the respondents argued successfully that the result in this case is controlled by this Court's decision in *Vlandis v. Kline, supra*. That case held unconstitutional a Connecticut statute which set up a mechanical and automatic bar, quite similar to the University's policy here, that prohibited certain students from showing residence in the State for purposes of obtaining in-state rates for tuition and fees at the state university. The Connecticut statute established a presumption that a student was a non-resident, and thus barred him from showing that he had established domicile in Connecticut, if he had a legal address outside the State, if single, during the year before he applied or, if married, at the time of his application. This Court held that it was a denial of due process to establish such a presumption and to deny an applicant the right to prove that his domicile was within the State either at the time of application or at a subsequent time during the period of his

attendance at the University. The Court stated:

> "It may be that most applicants to Connecticut's university system who apply from outside the State or within a year of living out of State have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category. Indeed, in the present case, both appellees possess many of the indicia of Connecticut residency, such as year-round Connecticut homes, Connecticut drivers' licenses, car registrations, voter registrations, etc. . . . ." 412 U.S. at 448.

The Court summarized its holding as follows:

> "In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees at its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." 412 U.S. at 452.

The present case is very similar to *Vlandis*. The University admittedly purports to be concerned with domicile in allocating the rates for its tuition and fees.[9] Yet it has erected an irrebuttable presumption that the holders of G-4 and other non-immigrant visas may never be domiciled in Maryland for purposes of obtaining in-state tuition and fee status.[10] It makes no attempt to distinguish between those G-4 aliens (or other non-immigrant

[9]See Pet. 4, stating that the University "bases its award of in-state status on domicile"; Pet. App. 32a, where the District Court noted that, according to the defendants, "domicile is the basis on which tuition rates are determined"; and Pet. App. 41a, where the District Court itself referred to the determination of domicile as the "crucial determination" under the University's policy.

[10]See Pet. 4, 5, and 19, where the petitioner states that the University has concluded that non-immigrant aliens are legally disabled from having the requisite intent to acquire Maryland domicile. See also Pet. App. 11a, 17a.

aliens) who may intend to reside indefinitely in Maryland and thus, under the properly considered indicia, would be considered domiciled there, and those who do not so intend. Rather, it simply denies the in-state rates to all such non-immigrant aliens on the basis of a conclusive presumption that they are not Maryland domiciliaries.

The petitioner contends that the controlling impact of *Vlandis* as a precedent in the case at bar was undercut by this Court's subsequent decision in *Weinberger v. Salfi, supra* (Pet. 11-13). Contrary to the petitioner's contention, however, the *Salfi* decision did not undermine the continued viability of *Vlandis*, but specifically distinguished that decision and preserved it as a precedent in an appropriate case, such as the one at bar. In *Salfi*, the Court, speaking through Mr. Justice Rehnquist, upheld the provision of the Social Security Act which defines "widow" and "child" so as to exclude surviving wives and stepchildren from survivors benefits when those wives and stepchildren had their respective relationships to a deceased wage earner for less than nine months prior to his death. The Court distinguished, but did not overrule, *Vlandis* as follows:[11]

> "In *Vlandis v. Kline*, a statutory definition of 'residents' for purposes of fixing tuition to be paid by students in a state university system was held invalid. *The Court held that where Connecticut purported to be concerned with residence, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue.*
>
> * * *

[11]The Court in *Salfi* also distinguished, but preserved, two other cases involving unconstitutional irrebuttable presumptions — *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). The Court stated that, unlike the claims involved in those cases, a non-contractual claim to receive funds from the federal treasury enjoys no constitutionally protected status, although, of course, there may not be invidious discrimination among such claims. 422 U.S. at 771-72.

"Unlike the statutory scheme in *Vlandis* . . . , *the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible.* . . . [T]he benefits here are available upon compliance with an objective criterion, on which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. . . . [A]ppellees are completely free to present evidence that they meet the specified requirements. . . ." (emphasis added). 422 U.S. at 771, 772.[12]

In drawing this distinction, the Court made clear that while a State may condition benefits upon compliance with an objective criterion on which individuals can present evidence, it may not, consistent with due process, condition benefits upon a factual test that it deems to be crucial — such as residency in *Vlandis*, fitness as a parent in *Stanley v. Illinois*, 405 U.S. 645 (1972), and fault in driving in *Bell v. Burson*, 402 U.S. 535 (1971) — and then preclude individuals from presenting relevant evidence that they meet that test. As thus drawn by the Court, the line of distinction resembles closely the traditional line which marks off,

[12]In making the last two statements, the Court analogized the case before it to *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971). In that case, the court had upheld the validity of a state university's one-year residency requirement for in-state status, which students could meet while in student status and after which time the students could present evidence of in-state residence. As the Court in *Salfi* recognized, that policy made the in-state rates available upon compliance with an objective criterion, evidence of which the students were free to present, rather than making the in-state rates available upon compliance with a certain factual test (residency) and then precluding certain students from presenting evidence that they met that test. Moreover, as recognized in *Vlandis* (412 U.S. at 452-53 n. 9) and as discussed below, the regulation in *Starns* allowed students to meet the one-year residency requirement while in student status. By contrast, the statute in *Vlandis* prohibited the students involved from ever rebutting the presumption of nonresidence during the entire time they remained in student status. The University's policy here likewise prohibits G-4 aliens from ever rebutting the presumption of non-domicile during the entire time they remain in G-4 status.

on the one side, impermissible invasions of or departures from procedural due process and, on the other side, the now judicially discredited challenges to legislative or administrative choices which before 1937 often had prevailed under the guise of substantive due process. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). Mr. Justice Rehnquist's language in dissent in *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 524 (1973), points up the constitutional difference between irrebuttable presumptions which trespass upon procedural due process and valid legislative limitations operating for the protection of the public in areas of economic regulation:

". . . There is a qualitative difference between, on the one hand, holding unconstitutional on procedural due process grounds *presumptions which conclude factual inquiries without a hearing on such questions* as fault, *Bell v. Burson*, 402 U.S. 535 (1971), the fitness of an unwed father to be a parent, *Stanley v. Illinois*, 405 U.S. 645 (1972), or, accepting the majority's characterization in *Vlandis v. Kline*, 412 U.S. 441 (1973), *residency*, and, on the other hand, holding unconstitutional a duly enacted prophylactic limitation on the dispensation of funds which is designed to cure systemic abuses." (Emphasis added.)

In short, it is clear that the decision in *Salfi*, while admittedly putting a limit on the outer reach of the irrebuttable presumption doctrine, left that doctrine standing in circumstances such as those involved in *Vlandis* and in the present case — namely, that even where no constitutionally protected right is involved, a State may not purport to be concerned with a particular fact and then erect a presumption that concludes the inquiry into that fact by preventing the individual seeking to prove that fact from introducing plainly relevant evidence of it.

That is precisely what the University has done here. In allocating its rates for tuition and fees, it purports to be concerned with domicile — defined in its statement of policy — as the test for in-state rates.[13] Yet at the same time, it denies to a

[13]See references cited in note 9, p. 8, *supra*.

group of individuals seeking to meet that test, G-4 visaholders, any opportunity to show factors clearly bearing on that issue — namely, whether they and their parents are domiciled in Maryland under the University's own definition of domicile. By thus establishing an irrebuttable presumption concluding, without a hearing, the inquiry into the fact that the University deems crucial, the University's policy at issue here falls within the class of irrebuttable presumptions which were condemned in *Vlandis* and which *Salfi* made clear are still invalid.[14]

This Court's decisions subsequent to *Salfi*, also cited by the petitioner (Pet. 13-14), likewise do not undermine the continued viability of *Vlandis* or its applicability to this case. The Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976), in upholding a congressional enactment providing that miners with complicated black lung disease were considered to be totally disabled and thus entitled to compensation, distinguished *Vlandis*. It noted that the effect of the challenged provision in the case before it — to provide compensation for complicated black lung disease — was precisely the Congress' intention and, of course, clearly permissible; and in any event it limited its holding to statutes "regulating purely economic matters," such as those in *Salfi*. *Id.* at 23-24. In *Knebel v. Hein*, 429 U.S. 288 (1977), unlike *Vlandis*, the regulations, under which a transportation allowance was included in income for food stamp purposes, did not purport to be concerned with a particular factual question and then conclude the inquiry into that fact; and hence, as the Court stated, they did not "embody

[14]That the Court in *Salfi* left standing the irrebuttable presumption doctrine in the kinds of cases distinguished in that opinion is confirmed by the Court's decision, subsequent to *Salfi*, in *Turner v. Department of Employment Security*, 423 U.S. 44, 46 (1975), where the Court struck down an irrebuttable presumption "virtually identical" to that held invalid in *LaFleur*. In the present case, as we have shown, the University's irrebuttable presumption is virtually identical to that struck down in *Vlandis*.

any conclusive presumption." *Id.* at 297. Similarly, in *Fiallo v. Bell*, 430 U.S. ____, 45 U.S.L.W. 4402 (1977), the challenged sections of the federal immigration laws contained no such conclusive presumption, but simply excluded the relationship between an illegitimate child and his natural father from the special immigration status accorded children or parents of American citizens or permanent resident aliens. In any event, the Court in *Fiallo* based its decision to uphold those sections on the Congress' traditional plenary power over immigration, which is "largely immune from judicial control." 45 U.S.L.W. at 4403.[15]

Moreover, in applying *Vlandis* to the present case, the decision of the courts below does not conflict with the lower court decisions cited by the petitioner (Pet. 14-15) — namely, *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed for want of subst. federal question*, ____ U.S. ____, 45 U.S.L.W. 3690 (1977); *Mogle v. Seiver County School Dist.*, 540 F.2d 478 (10th Cir. 1976); *Sellers v. Ciccone*, 530 F.2d 199 (8th Cir. 1976); and *Fisher v. Secretary of HEW*, 522 F.2d 493 (7th Cir. 1975). Each of those cases involved a flat, objective requirement or prohibition, rather than an irrebuttable presumption of the type involved in *Vlandis* and in the present case. For example, in upholding a statutory ban against voting by aliens in school elections, the court in *Skafte* explained:

> "The statutes do not purport to be concerned with prohibiting from voting persons with some common trait, which trait is conclusively presumed from the status of alienage. Instead, the statutes only purport to exclude aliens from voting. Thus, they do not create a conclusive presumption." 553 P.2d at 833.

[15]In their brief as amici curiae (pp. 6-7), the Commonwealth of Virginia et al. also cite *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). That case, too, however, involved a flat legislative requirement — that police officers must retire at age 50 — rather than any irrebuttable presumption purporting to be concerned with a particular fact and then concluding the inquiry into that fact.

The court in *Mogle*, in upholding a residency requirement for teachers, made the same point:

> "In [*Vlandis*], in effect, a fact question was identified and then decided by a conclusive presumption. . . .
>
> "In our case, the residency requirement does not involve such identification of a controlling fact question and decision of it by an irrebuttable presumption." 540 F.2d at 484-85.

The same was true of the prison policy in *Sellers*, which required long-term inmates to be within ten years of a release date in order to be eligible for a certain training program, and of the social security provision in *Fisher*, which conditioned benefits for domestic workers on their having minimum earnings from a single employer for a certain number of quarters.

Thus, no decision either by this Court or by any other court contradicts the applicability of *Vlandis* here, on almost the same general set of facts, in accordance with the distinction drawn in *Salfi* and followed in subsequent cases.

The petitioner attempts to distinguish *Vlandis* on the ground that the students there "could never qualify for in-state status," whereas here the University's presumption of non-domicile for G-4 visaholders "is not permanent," since G-4 students could qualify if they (or their parents if the students are financially dependent) "alter their immigration status to that of permanent resident alien" (Pet. 16). In this connection, the petitioner relies on *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971), where the court upheld a one-year residency requirement which allowed students from out of State to present evidence of in-state residence after living in the State for one year. This attempted distinction of *Vlandis* cannot stand up. Contrary to the petitioner's contention, the students in *Vlandis could* have qualified for the in-state rates by moving to Connecticut for a year before applying to the university or by dropping out of the university for a year, living in Connecticut for that year, and then reapplying. Such a possibility of a change in

status could not save the irrebuttable presumption in *Vlandis*, for the presumption was permanent for as long as the students remained in student status. By contrast, the regulation in *Starns* allowed students to meet the one-year residency requirement while in student status. No change in status was required. The University of Maryland's policy at issue here is like that in *Vlandis* rather than that in *Starns*. Its irrebuttable presumption of non-domicile is permanent for as long as the students or their parents remain in G-4 status. The fact that they might change their status in order to avoid the presumption, as the students in *Vlandis* could have done, cannot cure the constitutional defect.[16]

Similarly, the petitioner's contention that the interests asserted in support of the University's challenged policy are sufficient to justify that policy (Pet. 17-18) must fail. In the courts below, the petitioner advanced the interests of cost equalization on the basis of past financial support to the State and of administrative convenience. As the courts below recognized (Pet. App. 41a), *Vlandis* makes plain that those interests will not support an irrebuttable presumption of the type involved here. See 412 U.S. at 448-52. The petitioner now also asserts that, since an interest in limiting governmental expenditures to those with a greater affinity to the United States was sufficient to justify a congressional classification among aliens in *Mathews v. Diaz*, 426 U.S. 67, 83 (1976), it can justify the University's policy here as well. In *Mathews*, however, the Court based its decision squarely on the Congress' plenary power over aliens, which is for the most part "committed to the political branches of the Federal

[16]Moreover, for reasons discussed on p. 6, *supra*, the IDB and the World Bank do not file the forms necessary for their employees to adjust their visa status from G-4 to permanent resident. Hence, the requirement that G-4 visaholders so change their status in order to be eligible for in-state rates at the University would impose an arbitrary and unreasonable burden on such individuals. See *Robertson v. Regents of University of New Mexico*, 350 F. Supp. 100, 101-102 (D. N.Mex. 1972); *accord Covell v. Douglas*, 501 P.2d 1047, 1048 (Colo. 1972).

Government," *id.* at 81; and it made clear that the considerations and policies applicable in that area do not apply to *state* actions affecting aliens, *id.* at 84-87. In *Nyquist v. Mauclet*, 45 U.S.L.W. 4655, 4568 (1977), the Court confirmed explicitly that the "national affinity" interest "is not a permissible one for a State."[17]

In sum, the respondents submit that *Vlandis* has been preserved as invalidating irrebuttable presumptions that offend procedural due process — as distinguished from the implicit legislative assumptions necessary to make a statutory scheme work properly in areas of economic regulation — and that the University of Maryland's irrebuttable presumption of non-domicile for G-4 visaholders falls squarely within the class of those invalid under *Vlandis*.[18]

[17]The petitioner also suggests — though he doesn't clearly argue — that the University's conclusive presumption of non-domicile for G-4 aliens should have been upheld because it is universally true (Pet. 19-21). We note, however, that the question whether G-4 aliens are legally capable of establishing a domicile in Maryland for purposes of obtaining the in-state rates is a question of the interpretation of the law of domicile and of the federal immigration laws respecting G-4 visas — matters on which the opinion below is thorough and adequate to answer the petitioner's suggestion (Pet. App. 32a-41a).

[18]The amici curiae Commonwealth of Virginia et al. ask this Court to grant certiorari here in order to overrule *Vlandis*. For the reasons we have stated, the respondents believe that the holding in *Vlandis* was correct, and has been properly preserved, as applied to the fact situation in that case and in the present case as well. In any event, this case is not an appropriate one for reexamining the holding in *Vlandis*, since the University's policy at issue here, unlike that in *Vlandis*, involves and discriminates against *aliens* and as such, for the reasons shown in Part II below, is unconstitutional under the Equal Protection and Supremacy Clauses, regardless of the due process considerations discussed in *Vlandis*.

II.

The Decision Below Can Be Supported On Other Grounds.

A. The University's Policy Denies Equal Protection to a Class of Aliens.

The respondents argued below that the University's policy of flatly prohibiting G-4 visaholders from showing Maryland domicile denied them equal protection of the laws. While the courts below found it unnecessary to reach that question, we reassert the argument here as an alternative ground for denying a writ of certiorari.[19]

This Court's decision last Term in *Nyquist v. Mauclet, supra*, 45 U.S.L.W. at 4657, reaffirmed its prior holdings that "classifications by a State that are based on alienage are 'inherently suspect and subject to close judicial scrutiny,'" citing, *inter alia, Graham v. Richardson*, 403 U.S. 365, 372 (1971), *In re Griffiths*, 413 U.S. 717, 731 (1973), and *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). *Nyquist* involved a provision of a New York statute which barred state financial assistance for higher education to aliens who had neither applied for United States citizenship nor submitted a statement of intent to do so. New York contended that the statute "should not be subjected to strict scrutiny because it does not impose a classification based on alienage," but distinguishes "only within the 'heterogeneous class of aliens' and 'does not distinguish between citizens and aliens *vel non*.'" 45 U.S.L.W. at 4657. This Court rejected that argument, pointing out that the statute "is directed at aliens and only aliens are harmed by it. . . . [and] the fact that the statute is not an absolute bar [against aliens generally] does not mean that it does not discriminate

[19]See note 1, p. 2, *supra*.

against the class." *Id.* Likewise, in *Graham v. Richardson, supra*, the Court had struck down an Arizona statute that did not prohibit *all* aliens from obtaining welfare benefits, but only those who did not meet a durational residency requirement.

Similarly, in the present case, the University's policy barring G-4 and other non-immigrant aliens from ever showing Maryland domicile discriminates against that class of aliens by subjecting them to a restriction not faced by American citizens and immigrant aliens similarly situated. Thus, that classification is inherently suspect and subject to strict scrutiny. The petitioner has conceded, in his brief filed in the Fourth Circuit (p. 32), that the interests purportedly underlying the University's policy "will not withstand a 'strict scrutiny' Equal Protection standard . . . ." As relevant decisions of this Court show, the petitioner was clearly correct in that conclusion. See, *e.g., Shapiro v. Thompson*, 394 U.S. 618, 632-633 (1969); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 266 (1974).[20]

[20]Even if the University's policy of flatly prohibiting G-4 visaholders from showing Maryland domicile could be said not to trigger the strict scrutiny standard, it would still be void under the Equal Protection Clause. The policy draws a distinction between aliens holding G-4 visas and aliens holding immigrant visas. That distinction is essentially arbitrary and lacks a reasonable basis, and hence denies equal protection under the traditional "reasonable basis" standard. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). There is no relationship between, on the one hand, the holding of a G-4 rather than an immigrant visa and, on the other, an individual's intent to establish his domicile in Maryland. Additionally, there is no relationship between the holding of a G-4 rather than an immigrant visa and any alleged interest of the University in "cost equalization" based on tax contributions. Even if a G-4 employee of the IDB or the World Bank was able to change his visa status to that of an immigrant, the State still could not, because of international agreements and the federal statutes implementing such agreements, levy the state income tax on his income from the bank. Yet the University has admitted that, in such a case, it would allow the immigrant alien to show Maryland domicile, whereas it prohibits G-4 aliens from doing so, despite the fact that the two situations are the same so far as achieving or not achieving the State's purported purpose of "cost equalization" is concerned.

B. The University's Policy Violates the Supremacy Clause.

The decision below can also be supported on another ground raised by the respondents in the trial court though not reached by that court — namely, that the University's policy intrudes in areas reserved for federal regulation, in violation of the Supremacy Clause of the Constitution. It is established that, under that Clause, States may not interfere with international agreements or rights thereunder, *United States v. Belmont*, 301 U.S. 324, 331 (1937), *United States v. Pink*, 315 U.S. 203, 230-31 (1942), or encroach upon the exclusive federal power over, and policies involving, immigration and naturalization, *Graham v. Richardson, supra*, at 376-80, *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). The University's policy at issue here imposes on non-immigrant employees of the IDB and the World Bank restrictions not imposed on citizens and immigrants, and thus, we submit, interferes with the operation of the international agreements under which those banks were established and their foreign employees came to this country. Similarly, by imposing such peculiar restrictions on non-immigrant aliens, by conditioning their right to show Maryland domicile on their changing their immigration status to permanent resident, and by thus providing a financial incentive for them to change their visa status, the University has unlawfully intruded into the immigration field — an area occupied by the Federal Government because it is "one of the most important and delicate of all international relations," *Hines v. Davidowitz, supra*, at 64. These considerations, too, demonstrate the inappropriateness of granting certiorari in the present case on the question presented by the petitioner.

III.

No Compelling Policy Considerations Support the Grant of Certiorari.

In seeking certiorari, the petitioner claims that the decision below casts a cloud on the tuition policies of most public universities and colleges and may have a serious impact on the federal estate tax law (Pet. 19). Neither contention is valid.

The decision below is unlikely to have any extensive impact on public universities generally. The record does not reveal, and the respondents are unaware of, any other American public university or college which has adopted a domicile test for in-state tuition status and, at the same time, precludes the holders of G-4 visas from ever showing that they meet that test. Moreover, the issues presented here affect a limited number of people — primarily the holders of G-4 visas, whose children, for the most part, attend public universities and colleges in the Washington, D.C., and New York City areas, the two locales where international organizations have their headquarters in this country and where their employees reside.[21]

In claiming that the decision below may have consequences in federal estate tax law, the petitioner cites a single revenue ruling by the Internal Revenue Service, Rev. Rul. 74-364, 1974-2 C.B.

[21]The four States and the association which have filed a brief as amici curiae do not claim that their public universities have a policy like that of the University of Maryland or have significant numbers of G-4 students. Rather, their concern is based on their apparent belief that the decision below could "force publicly-supported colleges and universities to charge the same rate of tuition to all students, regardless of state residency or domicile" (p. 2). They state further that that decision "would enable non-immigrant aliens to reduce their tuition payments by the existing cost differential" (p. 3). These concerns are plainly groundless. The decision below in no way undermines the validity of a differential between in-state and out-of-state tuition rates. Nor does it automatically entitle non-immigrants to in-state rates. It simply requires the University to allow G-4 visaholders the *opportunity*, already afforded to citizens and immigrant aliens, to *show* domicile in the State.

321 (Pet. 20). That ruling held that the holder of a G-4 visa was not domiciled in the United States for federal estate tax purposes. The ruling, however, relied on two cases which, as the District Court demonstrated in detail, are clearly distinguishable on their facts from the present case (Pet. App. 39a-40a). These flimsy foundations for the revenue ruling cited by the petitioner emphasize the need for confining it to its own facts, even if it is assumed to be correct in that limited context. Moreover, residency for tax purposes is notoriously variable. In that connection, the United States Tax Court has recently held that an employee of the IDB — a citizen of Chile and a holder of a G-4 visa, who had resided in the United States since 1966 — was a resident alien for tax purposes and therefore entitled to file a joint income tax return with his wife claiming their children and his wife's mother as dependents. *Escobar v. Commissioner*, 68 T.C. 304 (1977). The Tax Court there noted that, even assuming that the stay of G-4 visaholders in the United States was limited by the immigration laws to a definite period, those aliens could nevertheless be residents of the United States for income tax purposes. Contrary to the petitioner's contention, therefore, the tax decisions collectively "establish that the immigration status of an alien does not conclusively determine whether [he] is a resident of the United States." *Brittingham v. Commissioner*, 66 T.C. 373, 414 (1976).

CONCLUSION

For all these reasons, the respondents urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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